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UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on
International Contract Practices
Eighteenth session
Vienna, 30 November - 11 December 1992

PROVISIONAL AGENDA

1. Election of officers
2. Adoption of the agenda
3. Preparation of a uniform law on international guaranty letters
4. Other business
5. Adoption of the report

Notes on the provisional agenda

Pursuant to a decision taken by the Commission at its twenty-first session, 1/ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit. The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

1/ Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 18.

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The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on a uniform law should be undertaken and entrusted this task to the Working Group. 2/ At its thirteenth session held in New York from 8 to 18 January 1990, the Working Group commenced its task by considering, on the basis of a note by the Secretariat (A/CN.9/WG.II/WP.65), possible issues of a uniform law. At its fourteenth session held at Vienna from 3 to 14 September 1990, the Working Group examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67) and considered the issues discussed in the note by the Secretariat relating to amendment, transfer, expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68). At its fifteenth session held in New York from 13 to 24 May 1991, the Working Group considered some remaining issues relating to the obligations of the guarantor and, based on notes by the Secretariat (A/CN.9/WG.II/WP.70 and 71), fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction. At its sixteenth session held at Vienna from 4 to 15 November 1991, the Working Group examined draft articles 1 to 13 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.73). At its seventeenth session held in New York from 6 to 16 April 1992, the Working Group examined draft articles 14 to 27 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add.1) and requested the Secretariat to revise the draft articles of the uniform law taking into account the deliberations and decisions of the Working Group (A/CN.9/361).

The Working Group is composed of all States members of the Commission. These are:

Argentina, Austria, Bulgaria, Cameroon, Canada, Chile, China, Costa Rica, Czechoslovakia, Denmark, Ecuador, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Singapore, Spain, Sudan, Thailand, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, and Uruguay.

Item 1. Election of officers

The Working Group, in accordance with its practice at previous sessions, may wish to elect a Chairman and a Rapporteur.

Item 3. Preparation of a uniform law on international guaranty letters

The Working Group will have before it at the eighteenth session a note by the Secretariat containing the revision of a draft uniform law on international guaranty letters (A/CN.9/WG.II/WP.76 and Add.1) and a note containing a proposal of the United States of America relating to draft rules on stand-by letters of credit (A/CN.9/WG.II/WP.77).

2/ Report of the United Nations Commission on International Trade Law on the work of its twenty-second session, Official Records of the General Assembly, Forty-Fourth session, Supplement No. 17 (A/44/17), para. 244.

The following documents will be made available at the session:

(a) Report of the Working Group on International Contract Practices on the work of its seventeenth session (A/CN.9/361);

(b) Report of the Working Group on International Contract Practices on the work of its sixteenth session (A/CN.9/358);

(c) Note by the Secretariat setting forth the tentative draft of a uniform law on international guaranty letters (A/CN.9/WG.II/WP.73 and Add.1);

(d) Report of the Working Group on International Contract Practices on the work of its fifteenth session (A/CN.9/345);

(e) Note by the Secretariat discussing further issues of a uniform law, namely fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70);

(f) Note by the Secretariat discussing possible further issues of a uniform law, namely conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71);

(g) Report of the Working Group on International Contract Practices on the work of its fourteenth session (A/CN.9/342);

(h) Note by the Secretariat setting forth a first draft of general provisions and an article on establishment for a uniform law on international guaranty letters (A/CN.9/WG.II/WP.67);

(i) Report of the Working Group on International Contract Practices on the work of its thirteenth session (A/CN.9/330);

(j) Note by the Secretariat discussing some issues of a uniform law: substantive scope of application, party autonomy and its limits, and rules of interpretation (A/CN.9/WG.II/WP.65);

(k) Report of the Working Group on International Contract Practices on the work of its twelfth session (A/CN.9/316);

(l) Note by the Secretariat setting forth tentative considerations on the preparation of a uniform law (A/CN.9/WG.II/WP.63);

(m) Report of the Secretary-General on stand-by letters of credit and guarantees (A/CN.9/301).

Item 5. Adoption of the report

The Working Group may wish to adopt, at the close of its session, a report for submission to the twenty-sixth session of the Commission.

Meetings

The session of the Working Group will take place from 30 November to 11 December 1992 at the Vienna International Centre. No meeting will be scheduled for Thursday, 10 December 1992, in order to allow for the preparation of the draft report of the session. Meeting hours will be from 9:30 to 12:30 and from 14:00 to 17:00, except on Monday, 30 November 1992, when the meeting will commence at 10:30 am.

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UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on
International Contract Practices
Eighteenth session
Vienna, 30 November - 11 December 1992

INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Revised articles of draft Convention on international guaranty letters

Note by the Secretariat

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[Revised articles on rights, obligations and defences, and on court measures, jurisdiction, and conflict of laws will be presented in an addendum to this note]

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INTRODUCTION

1. The Working Group on International Contract Practices examined at its sixteenth session draft articles 1 to 13 and at its seventeenth session draft articles 14 to 27 of a uniform law on international guaranty letters prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add. 1). The deliberations and conclusions of the Working Group are set forth in the reports of the Working Group on those two sessions (A/CN.9/358 and 361). The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 1 to 27.

2. The present note has been prepared pursuant to that request. It presents revised articles on sphere of application, interpretation and effectiveness of guaranty letter. Revised articles on rights, obligations and defences, and on court measures, jurisdiction and conflict of laws will be presented in an addendum to this note. The style of presentation is the same as that used in previous drafts and explained in paragraphs 3 and 4 of the introduction to document A/CN.9/WG.II/WP.73.

REVISED ARTICLES OF DRAFT CONVENTION ON INTERNATIONAL GUARANTY LETTERS

CHAPTER I. SPHERE OF APPLICATION

Article 1. Substantive scope of application [1]

This Convention [2] applies to international guaranty letters [3] [issued in a Contracting State] [4].

Remarks

1. The article heading should be modified to read "Scope of application" if the suggested addition of a territorial connecting factor would be accepted (see remark 4).

2. The term "Convention" is used here and in other provisions of the draft text following the Working Group's decision "to proceed on the working assumption that the final text would take the form of a convention without thereby precluding the possibility of reverting to the more flexible form of a model law at the final stage of the work when the Working Group would have a clear picture as to the provisions included in the draft text" (A/CN.9/361, para. 147).

3. Despite a concern expressed at the sixteenth session that the term "guaranty letter" did not embrace the stand-by letter of credit, the term has been retained in view of the Working Group's conclusion that it would be premature to take a final decision on the nominal issue of a common name (A/CN.9/358, para. 15). In an effort to meet that concern, revised article 2 defines the term expressly as embracing the independent guarantee and the stand-by letter of credit; that clarification might also be included in article 1. If the Working Group were in favour of establishing a clear dichotomy between these two types of guaranty letters, consideration might be given to specifying the applicability of the Convention to independent guarantees and stand-by letters of credit, providing separate definitions for these two types and using a simple, generic term (e.g. "banker's undertaking" or "assurance") as a common name to be used in those provisions applicable to both types.

4. The wording between square brackets has been added to solicit consideration of the issue of the territorial scope of application, based on the working assumption that the final text would be adopted in the form of a convention. Amongst the questions to be considered would be whether a territorial link with a Contracting State should be required and, if so, whether the tentatively suggested criterion of the place of issuance is appropriate. The answers to those questions, particularly the first one, will have implications on, and should thus be considered in conjunction with, possible provisions on conflict of laws (see draft articles 26 and 27 and accompanying remarks).

Article 2. Guaranty letter

(1) A guaranty letter is an independent undertaking [1] [,in the form of a demand guarantee or bond or in the form of a stand-by letter of credit,] [2] given by a bank or other institution or person (["issuer"] ["guarantor"]) [3] to pay to another person ("beneficiary") [or, if so stipulated in the undertaking, to itself acting as a fiduciary or through another branch] [4] a certain or determinable amount of a specified currency or unit of account [or other item of value] [or to accept a bill of exchange for a specified amount] [5] in conformity with the terms and [any documentary] conditions [6] of the undertaking when so demanded in the manner prescribed in the undertaking [7].

(2) The undertaking may be given

(a) at the request or on the instruction of the customer ("principal") of the issuer ("direct guaranty letter"),

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal") of that instructing party ("indirect guaranty letter"), or

(c) on behalf of the issuer itself ("guaranty letter on issuer's own behalf").

Remarks

1. It may be noted that the Working Group decided at its sixteenth session to maintain the reference to the "essentially documentary" character between square brackets as a reminder and to reconsider the issue at a later stage (A/CN.9/358, para. 21). However, that controversial reference has not been maintained in this draft article, in view of the later agreement of the Working Group "that the provisions in the uniform law should focus on instruments containing only documentary conditions" (A/CN.9/358, para. 61). As to an alternative suggestion for introducing the documentary character into the definition of "guaranty letter", see below, remark 6.

2. The reference to demand guarantees or bonds and to stand-by letters of credit has been included here for consideration by the Working Group for the reason set forth in remark 3 to article 1.

3. As regards the reference to the "guarantor" or "issuer" between square brackets, the Working Group decided at its sixteenth session to leave the matter to the drafting group that would be set up at a later session. However, the revised draft suggests a certain preference for the term "issuer" by inverting the order of the alternative terms in this draft article and by using in later articles only the term "issuer". There are at least three reasons for that preference: the term "issuer" is used in stand-by letter of

credit practice; the term "guarantor" might be misunderstood as embracing the issuer of an accessory guarantee; and the term "issuer" appears to be closer to the respective term used in the context of guarantees in a number of languages, including non-official languages. In consideration of the first reason, it is submitted that the proponents of stand-by letter of credit terminology could accept the retention of the term "principal" rather than insist on the term "applicant".

4. The wording between square brackets is modelled on draft article 6(6) of the United States proposal (A/CN.9/WG.II/WP.77). If its substance were to be adopted by the Working Group, consideration might be given to presenting it as a separate rule of interpretation in article 6.

5. The revised text does not retain the previous reference to "negotiation without recourse", taking into account the objections raised at the sixteenth session (A/CN.9/358, para. 33). However, consideration might be given to adding the wording "or to incur a deferred payment obligation" as suggested in the United States proposal, article 2(1).

6. The reference to "documentary conditions" has been inserted in view of the Working Group's agreement to focus on instruments containing only documentary conditions (A/CN.9/358, para. 61). The qualifier "any" has been added with a view to clearly embracing simple demand guarantees and clean stand-by letters of credit. The reference to the documentary nature of the conditions has been placed between square brackets since it might not be needed in view of revised draft article 3. Moreover, it might not be appropriate if the provisions of draft article 3(1)(b) and (2) were adopted.

7. It may be noted that Variants X and Y of previous draft article 2 have not been retained in the revised article. However, their substance has been included in other articles, i.e. articles 3(3) and 14.

Article 3. Independence of undertaking

(1) [For the purposes of this Convention,] an undertaking is [deemed to be] independent if:

(a) it provides for payment upon demand and presentation of any specified documents [,without any verification of facts that are outside the operational purview of the issuer];[1]

or

(b) it contains [as its heading and] within its text the words "Stand-by letter of credit" or "Demand guarantee" [or "Independent documentary promise" or "International guaranty letter"].[2]

(2) Where an undertaking referred to in paragraph (1)(b) of this article provides for payment upon the occurrence of a future uncertain event without specifying the documentary means for establishing that occurrence, payment is due only upon certification of that occurrence by the beneficiary [or the principal] [3], unless its verification falls within the operational purview of the issuer. The same rule applies to any non-documentary condition for the effectiveness of a guaranty letter or for the [reduction or increase] [adjustment] of its amount.

(3) While the purpose of an undertaking covered by this Convention [would ordinarily be] [may be] to secure the beneficiary against the non-fulfilment of certain obligations by the principal or against another contingency, the undertaking is not subject to, or qualified by, any underlying transaction or other relationship, even if referred to in the undertaking, [4] and the payment obligation does not depend on the [ultimate] determination of the occurrence of that contingency but solely on the presentation of any documents required in the undertaking or by paragraph (2) of this article. [The same rule applies to a counter-guaranty letter in respect of the contingency of the beneficiary of the counter-guaranty letter being demanded to pay under its guaranty letter.] [5].

Remarks

1. Paragraph (1) of completely revised draft article 3 describes the types of undertakings covered by the Convention. Retaining the concept of independence known in all legal systems, it defines as independent, in subparagraph (a), all undertakings not containing any non-documentary condition of payment, thus reflecting the Working Group's agreement to focus on instruments containing only documentary conditions (A/CN.9/358, para. 61).

2. Subparagraph (b) is intended to provide a "safe haven" in terms of certainty of the Convention's application. It is submitted that the benefits of certainty outweigh the possible disadvantages of the suggested provision, including the need for changing practice by requiring new labels, especially if one of those labels between square brackets were adopted. Apart from its main purpose of providing certainty, the provision might operate as an opting-in provision for some instruments that contain a non-documentary condition. It is in view of that possibility that paragraph (2) provides for conversion of any such condition into a documentary one. The result is, as summed up in paragraph (3), that no undertakings would be covered by the Convention that would require issuers to verify any facts outside their purview.

3. The reference to the principal might usefully be added in view of the fact that for many contingencies certification by the principal puts matters beyond doubt, although an exception would have to be made for the rule in the second sentence of paragraph (2) as regards the reduction of the amount of the guaranty letter. However, it should be clear that the issuer does not have the right to choose between the principal and the beneficiary but must be content with the certification by either of them. It may also be noted that the mode of conversion imposed by paragraph (2) would not be applicable if the issuer and the beneficiary agree on another documentary means of establishing the occurrence of the contingency and thus amend the guaranty letter.

4. Consideration might be given to adding wording to the effect that neither the issuer nor the beneficiary may invoke any defence arising from a relationship other than that created between them by the undertaking. If such clarifying wording were to be added it might be appropriate to add also the last sentence of previous draft article 3(1): "The independent character of an undertaking is not affected by the fact that the issuer, as provided in article 17(1)(c), may raise certain objections to payment that might be based on facts relating to any such other relationship".

5. The sentence between square brackets is not absolutely necessary since its substance is already included in the first sentence that covers all undertakings, including those of counter-guarantors. However, it might help to emphasize the independent nature of the counter-guaranty letter, as, for example, done in article 2(c) of the ICC Uniform Rules for Demand Guarantees (URDG - 458). For a definition of counter-guaranty letter see article 6(d).

Article 4. Internationality of guaranty letter [1]

(1) A guaranty letter is international if:

(a) the places of business specified in the guaranty letter of any two of the following persons are in different States: issuer, beneficiary, principal, instructing party [,adviser] [2] or confirmer; or

(b) it expressly states that it is international or that it is subject to [generally recognized] international rules or usages of guarantee or letter of credit practice. [3]

(2) For the purposes of the preceding paragraph:

(a) if the guaranty letter lists more than one place of business of a given party, the place of business is that which has the closest relationship to the guaranty letter;

[(b) if the guaranty letter does not specify a place of business for a given party but specifies its habitual residence, that residence is relevant for determining the international character of the guaranty letter.] [4]

Remarks

1. It may be recalled that the Working Group has previously discussed, and left open the final decision on, whether the uniform law should extend to domestic transactions (A/CN.9/358, para. 66). If the prevailing view were in favour of such extension, consideration might be given to including in the draft Convention a reservation that would allow States to limit its application to international guaranty letters.

2. As suggested in the United States proposal (article 4(1)(a)), the term "adviser" has been added to reflect stand-by letter of credit practice, although the practical effect of that addition would probably be limited. If the addition is based on the assumption that the adviser's place of business is often the place of payment, consideration might be given to referring directly to the place of payment as one of the places relevant for determining internationality.

3. Subparagraph (b) presents two ways of fulfilling, by means of a statement, the internationality requirement as a condition of the Convention's application. If, as suggested at the sixteenth session for the uniform law (A/CN.9/358, para. 70), a straightforward opting-in provision would be preferred to the provision in subparagraph (b), such opting-in provision might be added to article 1 along the following lines: "and to any guaranty letter that states that it is subject to this Convention".

4. Revised paragraph (2)(b) has been adjusted to the rule adopted in paragraph (1)(a). It has been placed between square brackets with a view to soliciting consideration of whether such a rule relating to habitual residence is necessary.

CHAPTER II. INTERPRETATION

Article 5. Principles of interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international guarantee and stand-by letter of credit practice.

Article 6. Rules of interpretation and definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "guaranty letter" includes "counter-guaranty letter" and "confirmation of guaranty letter", and "guarantor" includes "counter-guarantor" and "confirmer";

(b) any reference to the guaranty letter or the undertaking of the issuer, or to its terms and conditions, is to the text as originally established in accordance with article 7 or, if later amended in accordance with article 8, to the text in its last amended version;

(c) where a provision of this Convention refers to a possible agreement or stipulation of the parties, the parties meant are the issuer and the beneficiary of the guaranty letter in question;

(d) "counter-guaranty letter" means a guaranty letter given to the issuer of another guaranty letter by its instructing party [or to the issuer of another guarantee or letter of credit] [1] and providing for payment upon demand and presentation of any specified document [2] stating that payment [under that other guaranty letter or undertaking] has been demanded from, or made by, the beneficiary of the "counter-guaranty letter";

(e) "counter-guarantor" means the issuer of a counter-guaranty letter;

(f) "confirmation" of a guaranty letter means an independent undertaking added to that of the issuer providing the beneficiary with the option of demanding payment and, unless expressly stipulated otherwise, presenting any required documents to the confirmer [instead of to the issuer] [3];

(g) "confirmer" means the person confirming a guaranty letter;

(h) "document" means a communication made in a form that provides a complete record thereof [and is authenticated as to its source by generally accepted means or by a procedure agreed with the recipient] [4].

Remarks

1. The wording between square brackets is designed to embrace guaranty letters that back, or ensure reimbursement of, undertakings of the beneficiary other than guaranty letters such as accessory guarantees or commercial letters of credit. However, it is difficult to find wording that is sufficiently precise so as not to embrace too many types of undertakings, e.g. insurance obligations.

2. The reference to documents specified in the counter-guaranty letter might have to be modified if the suggested provisions of draft article 3(1)(b) and (2) were adopted.

3. It is submitted that the suggested definition of "confirmation" of guaranty letters is suitable for bank guarantees as well as stand-by letters of credit. See, however, the suggested definition of "confirmer" in the United States proposal which includes the requirement of an authorization by the issuer.

4. The suggested definition of "document" is modelled on article 7 that sets forth the form requirement for the establishment of the guaranty letter and it has the effect of excluding purely oral communications. The reference to authentication has been placed between square brackets so as to solicit consideration of whether that requirement is appropriate for all documents envisaged by the Convention.

CHAPTER III. EFFECTIVENESS OF GUARANTY LETTER

Article 7. Establishment of guaranty letter

(1) A guaranty letter may be established in any form which preserves a complete record of the text of the guaranty letter and provides authentication of its source by generally accepted means or by a procedure agreed upon by the parties.

(2) Variant A Unless otherwise stated therein, a guaranty letter becomes effective and irrevocable when it leaves the issuer's sphere of control ("issuance"). [1]

Variant B A guaranty letter becomes effective and [, unless it expressly states that it is revocable,] irrevocable when it is issued, provided that it does not state a different time of effectiveness [2].

Remarks

1. As suggested at the sixteenth session (A/CN.9/358, para. 81), a definition of the term "issuance" has been incorporated in Variant A. If Variant B were to be adopted, such a definition could be included in article 6.

2. Consideration might be given to formulating the proviso in a more elaborate manner along the lines of the second sentence of Variant X of previous draft article 7(2). If a reference to conditions of effectiveness were to be included, account would have to be taken of the decision on article 3(1) and (2) concerning the possibility of non-documentary conditions of effectiveness and their conversion into documentary ones.

Article 8. Amendment

(1) A guaranty letter may be amended in the form agreed upon by the parties or, failing such agreement, in any form referred to in paragraph (1) of article 7.

(2) The amendment becomes effective, unless a different time of effectiveness is stated in the amendment or has been agreed upon by the parties,

Variant A when it is issued [by the issuer], provided that it consists solely of an extension of the validity period of the guaranty letter; any other amendment becomes effective when the issuer receives a notice of acceptance by the beneficiary, unless a different time of effectiveness is stipulated.

Variant B when it is issued, unless the issuer receives a notice of rejection by the beneficiary within [ten] [business] days.

[(2 bis) An amendment affects the confirmation of a guaranty letter only if the confirmer consents to the amendment.] [1]

[(3) Variant Y The provisions of paragraphs (1) and (2) of this article do not entitle the issuer to invoke the amendment in support of any claim for reimbursement against the principal if the issuer failed to obtain the consent of the principal required by agreement or law.

Variant Z When issuing an amendment, the issuer shall promptly dispatch a copy thereof to the principal.]

Remarks

1. New paragraph (2 bis) has been added with a view to underlining the independent nature of the confirmer's undertaking.

Article 9. Transfer of rights

Variant A The beneficiary's right to demand payment under the guaranty letter may be transferred only if so, and to the extent and in the manner, [1] authorized in the guaranty letter. [2]

Variant B (1) The beneficiary's right to demand payment under the guaranty letter may not be transferred unless so expressly authorized by the issuer in the guaranty letter [or by prior consent in a form referred to in paragraph (1) of article 7] [3].

(2) Partial or successive transfers are permitted only if so expressly authorized by the issuer.

(3) If a guaranty letter is designated as "transferable" [, or contains words of similar import,] without specifying whether or not the consent of the issuer [or another authorized person] is required for the actual transfer,

Variant X — the issuer must, and any other authorized person may, within the limits of the authorization [effect] [implement] the transfer. [4].

Variant Y — no such consent is needed. [5]

Variant Z — neither the issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it. [6]

Remarks

1. It is submitted that the inserted reference to the extent and manner of the transfer authorized in the guaranty letter covers such issues of detail as whether partial or successive transfers are permitted. However, the reference might be viewed as too general or abstract; for that reason, a more detailed alternative is presented in Variant B, especially its paragraph (2).

2. The reference to authorization in the guaranty letter which, according to article 6(b), includes any amendment, appears to be sufficiently comprehensive, provided that no other form of consent would be envisaged. However, it might not clearly determine the question addressed in paragraph (3) of Variant B, namely whether in addition to the authorization in the guaranty letter a consent to the actual transfer request is required.

3. The wording between square brackets is designed to solicit consideration of whether an authorization or consent could be given outside the guaranty letter or amendment procedure.

4. Variant X, which is modelled on the more elaborate article 9A(3) of the United States proposal, presents an intermediate solution between those presented in Variants Y and Z. It reflects the view that the issuer's authorization is sufficient in itself and thus no further consent is required while any other authorized person such as the confirmer or adviser is merely authorized but not obliged by the authorization contained in the guaranty letter.

5. Variant Y reflects the view that an authorization which is not qualified by such words as "subject to our written consent" binds not only the issuer but also any other authorized person ("transferring bank" in letter of credit parlance) since that person knew and is regarded as having accepted the authorization when, for example, confirming or advising the guaranty letter. However, consideration might be given to softening somewhat the radical solution presented in Variant Y by wording along the following lines: "however, the issuer or other authorized person may not implement or recognize any transfer that would manifestly be contrary to public policy or otherwise unlawful".

6. Variant Z reflects the view that the designation of a guaranty letter as transferable opens the door for transfer requests without, however, obliging any bank to comply with such requests. It is inspired by the interpretation given to article 54 of the Uniform Customs and Practice for Documentary Credits by the Privy Council in its (controversial) decision in Bank Negara Indonesia 1946 v. Lariza (Singapore) Pte Ltd [1988] AC 583.

Article 9 bis. Assignment of proceeds

(1) The beneficiary may assign to another person any proceeds to which it may be [, or may become,] [1] entitled under the guaranty letter.

(2) Variant A If the issuer, or another person obliged to effect payment, has received a notice in a form referred to in paragraph (1) of article 7 of the beneficiary's [irrevocable] assignment, payment to the assignee discharges the obligor [,to the extent of its payment,] [2] from its liability under the guaranty letter.

Variant B An assignment obliges the issuer or other person authorized to effect payment to honour a demand made by the beneficiary in conformity with the terms and conditions of the guaranty letter by payment to the assignee, when the recipient of the demand acknowledges the [notified] assignment in a form referred to in paragraph (1) of article 7; the acknowledgement may be made dependent on an agreement with the beneficiary on procedural and similar points with a view to ensuring certainty of, and to preventing measures conflicting with, the assignment and its implementation [3].

(3) The issuer or other person effecting payment may

Variant X exercise any right of set-off with a claim against the beneficiary within the limits of article 20.

Variant Y invoke towards the assignee any right of set-off referred to in article 20. [4]

Remarks

1. The wording between square brackets is designed to address clearly the situation of an assignment made before the beneficiary demands payment. However, it may be thought that this situation is covered with sufficient clarity by the words "it may be entitled".

2. The reference to the extent of the payment is designed to match the amount of the payment with the extent of the discharge. It may become relevant where the assigned proceeds are less than the amount available under the guaranty letter. Consideration might be given to addressing more directly the question of partial assignment.

3. An illustrative description of the possible points to be regulated in the agreement is provided in comment 1 on article 9B of the United States proposal.

4. Variant X expressly limits the right of set-off to claims against the beneficiary, thus excluding any possible claims against the assignee. Variant Y, like a general proviso such as "subject to the provisions of article 20", does not clearly address that important question.

Article 10. Cessation of effectiveness of guaranty letter

(1) The guaranty letter ceases to be effective when:

(a) the issuer receives from the beneficiary a statement of release from liability in a form referred to in paragraph (1) of article 7;

(b) the beneficiary and the issuer agree on the termination of the guaranty letter [in a form referred to in paragraph (1) of article 7] [1];

(c) Variant A the issuer [, or other person authorized to effect payment,] [2] pays the amount [available] [owed] under the guaranty letter; or

Variant B the issuer pays

(i) the maximum amount as stated in the guaranty letter or as reduced according to an express provision in the guaranty letter that sets forth a clear [and readily workable] method of reduction by a specified or determinable amount on a specified date or upon presentation to the issuer of a required document [3];

(ii) if a part of the maximum amount has previously been paid, the remaining balance;

(iii) if the beneficiary of a guaranty letter [that does not provide for partial demands] [4] demands payment of only part of the maximum amount and consents to the release of the issuer from liability as to the remaining balance, the requested partial amount,

unless the guaranty letter provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness; or

(d) the validity period of the guaranty letter expires in accordance with the provisions of article 11.

(2) The provisions of paragraph (1) of this article apply irrespective of whether any document embodying the guaranty letter is returned to the issuer, and the retention of any such document by the beneficiary does not preserve any rights of the beneficiary under the guaranty letter, unless the guaranty letter stipulates [otherwise] [that it does not cease to be effective without the return of the document embodying it][5].

Remarks

1. Consideration might be given to requiring the form of article 7(1) only for the beneficiary's agreement or consent and to consolidating subparagraphs (a) and (b) along the following lines "the issuer receives from the beneficiary a statement to that effect in a form referred to in paragraph (1) of article 7".

2. The wording between square brackets is intended to solicit consideration of whether the reference to another authorized person should be included, as, for example, done in article 9 bis, in all provisions dealing with payment and payment demands, whether that point should be clarified in a general rule of interpretation, or whether no express clarification is needed in view of general principles of interpretation.

3. The required document would be the one specified in the guaranty letter or, if article 3(1)(b) and (2) were to be adopted, a certification by the beneficiary.

4. The wording between square brackets is geared to the case, referred to at the sixteenth session (A/CN.9/358, para. 127), of a single partial drawing under a stand-by letter of credit that does not permit or envisage partial drawings. It is submitted that the single partial drawing would render the guaranty letter ineffective only if the understanding is that such payment exhausts the guaranty letter. If that analysis is correct there appears to be no reason for limiting the provision to guaranty letters that do not provide for partial drawings.

5. The latter wording between square brackets describes the required substance of any stipulated derogation from paragraph (1). This more elaborate wording would, better than the alternative wording "otherwise", make it clear that, for example, a stipulation merely obliging the beneficiary to return the document would not fall under the proviso.

Article 11. Expiry

The validity period of the guaranty letter expires:

(a) at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the guaranty letter, provided that, if the expiry date is not a business day at the place of business of the issuer, expiry occurs on the first business day which follows [1];

(b) if expiry depends according to the guaranty letter on the occurrence of an event, when the guarantor receives confirmation that the event has occurred by presentation of the document specified for that purpose in the guaranty letter [or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event];

(c) Variant A if the guaranty letter does not contain a provision on the time of expiry, when five years have elapsed from the date at which the guaranty letter had become effective. [2]

Variant B if the guaranty letter states neither an expiry date nor an expiry event, or if a stated expiry event has not yet been established by presentation of the required document, five years after the establishment of the guaranty letter, unless the guaranty letter [is issued in the form of a demand guarantee or bond and] [3] contains an express stipulation of indefinite validity.

Remarks

1. The rule set forth as a proviso is modelled on article 2(2) of the UNCITRAL Arbitration Rules; its application might be expanded to other periods of time that might be included in the final text.

2. It is submitted that Variant A, despite its brevity, covers all situations of stipulations or their absence that are spelled out in Variant B. However, it does not embrace the situation of a stated expiry event that has not been established within five years.

3. The wording between square brackets is designed to exclude stand-by letters of credit from the application of the proviso, as suggested at the sixteenth session (A/CN.9/358, para. 152). Depending on the future number of provisions that the Working Group decides would not be applicable to stand-by letters of credit, consideration might be given to listing all those provisions in one place, probably in the first chapter.

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INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Revised articles of draft Convention on international guaranty letters

Addendum

Note by the Secretariat

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CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 12. Determination of rights and obligations

(1) Subject to the provisions of this Convention, [1] the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, general conditions or usages [specifically] referred to therein.

(2) Variant A The parties are considered, unless otherwise agreed, to have impliedly made applicable to [their relationship] [the guaranty letter] a usage of which the parties knew or ought to have known and which in international [trade and finance] [guarantee or stand-by letter of credit practice] is widely known to, and regularly observed by, parties to guaranty letters.

Variant B [In interpreting terms and conditions of the guaranty letter and] [2] in settling questions that are not addressed by the terms and conditions of the guaranty letter or by the provisions of this Convention, regard [may] [shall] be had to generally accepted international rules and usages of guarantee or stand-by letter of credit practice.

Remarks

1. As stated during the sixteenth session of the Working Group (A/CN.9/358, para. 155), the proviso has been used in previous international instruments and is commonly interpreted as meaning that only the mandatory provisions of the Convention prevail over stipulations by the parties; suppletive provisions, i.e. provisions from which the parties may derogate, apply only in the absence of an agreement by the parties on the matters addressed by those provisions. If the Working Group were to regard the proviso as not being sufficiently clear, consideration might be given to limiting the proviso to mandatory provisions of the Convention and to adding to paragraph (1) or (2) a separate reference to suppletive provisions, taking into account the decision on whether such provisions should prevail over usages not referred to in the guaranty letter, as suggested in Variant B, or whether the opposite result is desirable, as suggested in Variant A.

2. The wording between square brackets is based on an intermediate view expressed at the sixteenth session concerning the relevance of usages not referred to in the guaranty letter (A/CN.9/358, para. 161). However, that view is presented here as an additional field of application of such usages, in addition to the questions that cannot be answered by the sources of determination mentioned in paragraph (1).

Article 13. Liability of issuer

(1) The issuer shall act in good faith and exercise reasonable care [as required by good guarantee or stand-by letter of credit practice].

(2) Variant A — Issuers [and instructing parties] may not be exempted from liability for their failure to act in good faith or for any grossly negligent conduct.

Variant B — The issuer may not be exempted from liability [towards the beneficiary] [1] for failing to discharge its obligations under the guaranty letter in good faith and [, subject to the provisions of paragraph (1) of article 16,] [2] with reasonable care. However, the extent of liability may be limited to [the amount of the guaranty letter] [foreseeable damages].

Remarks

1. The wording between square brackets has been added to Variant B with a view to soliciting consideration of whether the strict standard of mandatory liability suggested in that Variant should benefit only the beneficiary. While such a restriction might be viewed as balancing the strictness of the standard and could meet the possible desire of the principal and the issuer to agree on a lower standard, it would considerably reduce the practical relevance of the suggested standard.

2. The proviso referring to article 16 has been added with a view to accommodating a possible consent by the principal to requiring less than reasonable care in the examination of documents, as suggested for consideration by the Working Group in article 16 and as envisaged in article 13(1) of the United States proposal. Since such lower standard of care is likely to affect adversely the principal rather than the beneficiary, the proviso would seem appropriate only if the restriction to the beneficiary discussed in remark 1 were not to be adopted. The proviso, if accepted, would constitute one of the elements built into Variant B with a view to softening the strictness of the liability standard, together with the reference to the discharge of the obligations under the guaranty letter and with the limits of the recoverable amount suggested in the alternative at the end of Variant B.

Article 14. Demand

Any demand [for payment] [1] under the guaranty letter shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the guaranty letter. In particular, any certification or other document required by the guaranty letter [or this Convention] shall be presented, within the time of effectiveness of the guaranty letter, to the issuer at the place where the guaranty letter was issued, unless another person or another place has been stipulated in the guaranty letter [2]. If no statement or document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that payment is due.

Remarks

1. Deletion of the words "for payment" which seem unnecessary here might meet the concern, raised at the seventeenth session (A/CN.9/361, para. 15) and in the United States proposal (note to article 14), relating to the presentation of a bill of exchange under a stand-by letter of credit. However, the reference to payment which is found in various other articles and appears to be necessary there could be retained in view of the fact that article 2 embraces the acceptance of a bill of exchange and other types of obligations of the issuer in terms of payment modalities. If all such modalities suggested in article 2 were to be adopted, consideration might be given to embodying them in a definition of payment in article 6.

2. The proviso has been added with a view to accommodating, as suggested at the seventeenth session (A/CN.9/361, para. 17), situations where payment is claimed not directly from the issuer or a confirming bank but from another bank. It would also accommodate the situation, apparently not envisaged by article 14 URDG which requires presentation at the place of issue, where payment by the issuer has to be demanded by presentation of documents at a place other than that where the guaranty letter was issued.

[Article 15. Notice of demand [1]

Without delaying the fulfilment of its duties under articles 16 and 17, [2] the issuer shall promptly upon receipt of the demand give notice thereof to the principal or, where applicable, its instructing party, unless otherwise agreed between the issuer and the principal. Failure to give notice does not deprive the issuer from its right to reimbursement but entitles the principal to recover from the issuer damages for any loss suffered as a consequence of that failure.]

Remarks

1. If the article were to be retained, consideration might be given to exempting stand-by letters of credit from the notice requirement, as suggested at the seventeenth session, although it was also then suggested that the notice procedure might usefully be applied to them (A/CN.9/361, paras. 26-27). It is submitted that deletion of the article would in practice lead to a similar result since, as expected by the International Chamber of Commerce, stand-by letters of credit are likely to be subject to the UCP which do not require such notice, and demand guarantees are likely to incorporate the URDG which, in article 17, require notice of demand, without, however, addressing the consequences of failure to give the notice.

2. Consideration might be given to placing article 15, if retained, after articles 16 and 17 with a view to adding emphasis to the rule expressed in the opening words of article 15, namely that the required giving of notice shall not adversely affect the process leading to payment.

Article 16. Examination of demand and accompanying documents

(1) Variant A The issuer shall examine documents in accordance with the standard of conduct referred to in paragraph (1) of article 13 [, unless the principal has agreed to a lower standard] [1]. In determining whether the documents are in facial conformity with the terms and conditions of the guaranty letter, the issuer shall observe the [pertinent] [applicable] standard of international guarantee or stand-by letter of credit practice. [2]

Variant B The issuer shall examine the demand and accompanying documents with the professional diligence required by international guarantee or stand-by letter of credit practice [, unless the principal has consented to a lesser duty of care,] to ascertain whether they appear on their face to conform with the terms and conditions of the guaranty letter and to be consistent with one another. [3]

(2) Unless otherwise stipulated in the guaranty letter, the issuer shall have reasonable time, but not more than seven days [4], in which to examine the demand and accompanying documents and to decide whether or not to pay.

Remarks

1. The wording between square brackets has been added with a view to accommodating the possible need, referred to at the sixteenth session (A/CN.9/358, para. 171), for guaranty letters at lower costs, in particular, with reduced examination fees.

2. Variant A embodies the division proposed at the seventeenth session (A/CN.9/361, paras. 37 to 39) between the examination of documents and the determination of their facial compliance with the terms of the guaranty letter.

3. Based on the view that such a division may be artificial and lead to complications, Variant B embodies another approach suggested at the seventeenth session (A/CN.9/361, para. 36) and combines the standard of diligence with international practice requirements. As regards the examination of documents, the difference between Variant A and B seems to be minimal if the Working Group were to retain in article 13 the suggested reference to practice requirements.

4. The reference to "days", rather than "business days" as used in the previous draft, accords with the terminology used in other legal texts elaborated by the Commission. If, however, the term "business days" were to be preferred, consideration should be given to including in the draft Convention, probably in article 6 and together with the rule currently embodied in the proviso in article 11(a), a provision on the calculation of a period of business days, particularly on the effect of non-business days falling within that period.

Article 17. Payment or rejection of demand

(1) The issuer shall pay against a demand

Variant A — in conformity with the terms and conditions of the guaranty letter. [1]

Variant B — made by the beneficiary in accordance with the provisions of article 14. [2]

(2) The issuer shall not make payment if

Variant X — it knows or ought to know [3] that the demand is improper according to article 19.

Variant Y — the demand is manifestly and clearly improper according to the provisions of article 19.

(3) If the issuer decides to reject the demand [on any ground referred to in paragraphs (1) and (2) of this article], it shall promptly give notice thereof to the beneficiary by teletransmission or, if that is not possible, by other expeditious means. Unless otherwise stipulated in the guaranty letter, [4] the notice shall

Variant A — indicate the reason for the rejection.

Variant B — , if non-conformity of documents with the terms and conditions of the guaranty letter constitutes the reason for the rejection, specify each discrepancy and, if the rejection is based on another ground, indicate that ground.

[(4) If the issuer fails to comply with the provisions of article 16 or of paragraph (3) of this article, it is precluded

Variant X — from claiming that the demand was not in conformity with the terms and conditions of the guaranty letter.

Variant Y — from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions.]

Remarks

1. Variant A closely follows a suggestion made at the seventeenth session (A/CN.9/361, para. 49). Since Variant A does not clearly embrace the requirements set forth in article 14 relating to the form of the demand and the place of presentation, Variant B which refers to article 14 has been added for consideration by the Working Group. It should be recalled that it was stated in support of the above suggestion, and apparently accepted by the Working Group, that the reference to conformity with the terms and conditions of the guaranty letter would encompass the issues of existence, validity and enforceability of the undertaking that had been specifically addressed in previous subparagraph (a) of paragraph (1). The Working Group may wish to consider whether that interpretation is sufficiently clear or whether it would not be appropriate, for example, to add to paragraph (2) as further ground of rejection the invalidity of the guaranty letter.

2. Paragraph (1), in whichever Variant, leaves open the question whether the issuer, in the exceptional case where it would not be obliged to pay, would have an obligation or a mere authorization to refuse payment. The Working Group may wish to decide that question; if the decision were in favour of an obligation not to pay, that solution might be included in paragraph (2).

3. Variant A contains, as agreed at the seventeenth session, a rule to the effect that an issuer who knows or ought to know that the demand is improper shall reject the demand (A/CN.9/361, para. 55). However, it is submitted that the concept of knowledge of a person or institution creates difficulties of proof because of its subjective character. Moreover, knowledge of the issuer might not be an appropriate criterion if one wants to achieve strict parallelism between article 17 and article 21 as regards the required standard of proof. It is for those reasons that Variant Y has been added for consideration by the Working Group.

4. The proviso would help to accommodate different practices as reflected, for example, by the fact that article 10(b) URDG does not require the statement of reasons, while the UCP (in article 16(d)) contains a rule requiring reasons that differs in scope and content from those suggested in Variants A and B.

[Article 18. Request for extension or payment in the alternative [1]

If the beneficiary combines a demand for payment with a request for an extension of the validity period of the guaranty letter, the issuer shall comply with the following rules, unless otherwise agreed by the parties:

Variant A

(a) The issuer shall give to the principal prompt notice of the alternative demand for extension or payment;

(b) The issuer may not extend the validity period without the consent of the principal; however, even if the principal consents to the extension, the issuer is not obliged to extend the validity period, unless so required by an agreement with the principal;

(c) The issuer shall examine the demand for payment in accordance with article 16 and decide whether to pay or to reject that demand; if the issuer decides not to reject the demand, it may defer payment until ten days have elapsed after receiving the alternative demand from the beneficiary and then make payment, unless the issuer extends the validity period.

Variant B

(a) The issuer shall reject the demand for payment because of its [conditional] [equivocal] character [and promptly notify the beneficiary thereof];

(b) The issuer shall treat the request for extension as a request for amending the guaranty letter in accordance with the provisions of article 8.] [2]

Remarks

1. If the article were to be retained, consideration might be given to excluding from its scope stand-by letters of credit, as suggested at the seventeenth session, although it was also then suggested that no such limitation would be warranted (A/CN.9/361, para. 67). It is submitted that deletion of the article would in practice lead to a similar result since, as expected by the International Chamber of Commerce, stand-by letters of credit are likely to be subject to the UCP which do not address the extend-or-pay situation, and demand guarantees are likely to incorporate the URDG which, in article 26, contain rules that are roughly comparable with those suggested in Variant A.

2. If the article were to be retained with Variant B, consideration might be given to adding here or to article 8 some rules on communications and other procedures to be followed in the case of an amendment request made by the beneficiary. Consideration might also be given to placing the article before article 16 so as to emphasize the lack of any need for examining the demand.

Article 19. Improper demand

(1) Variant A — The issuer shall reject a demand as improper if, having due regard to the independent and documentary character of the undertaking, it is clear and beyond doubt to the issuer that: [1]

Variant B — A demand for payment is improper if:

(a) [the beneficiary knows that] any document is forged;

(b) the beneficiary knows or cannot be unaware that no payment is due [on the basis asserted in the demand and the supporting documents]; or

(c) judging by the type and purpose of the guaranty letter, the demand has no conceivable basis.

(2) Variant X — The following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the guaranty letter was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal has been declared invalid by a court or arbitral tribunal;

(c) The secured obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented solely by wilful misconduct of the beneficiary. [2]

Variant Y — Instances of a demand that has no conceivable basis include [, but are not limited to,] [3] the following, unless otherwise indicated in the guaranty letter [4]:

(a) In the case of a guaranty letter that supports the financial obligation of a third party [5], neither the principal amount nor any interest is due [and the third party has not become insolvent];

(b) In the case of a tender guaranty letter, the contract has not been awarded to the principal or, if so awarded, the principal has signed the contract and procured any required performance guaranty letter;

(c) In the case of a repayment guaranty letter, no advance payment has been made or it has been repaid in full;

(d) In the case of a performance guaranty letter, the underlying obligation of the principal has been declared invalid in a final decision of a competent court or arbitral tribunal, or it has been completely fulfilled [to the satisfaction of the beneficiary], or its fulfilment has been prevented exclusively by wilful misconduct of the beneficiary;

(e) In the case of a counter-guaranty letter, the beneficiary has not received a demand for payment under the guaranty letter issued by it, or the beneficiary has paid upon such a demand although it was obliged [under the law applicable to its guaranty letter] [6] to reject the demand [as lacking conformity or as being improper].

Remarks

1. Variant A follows the approach previously embodied in Variant D and preferred by the Working Group. However, it duplicates some elements already contained in article 17 (2), namely the duty to reject and the requirement that the improper nature of the demand be known or manifest and clear. If Variant A were to be retained, it would have to be aligned with article 17 (2), and consideration might be given to incorporating article 19, depending on its final length, into article 17.

2. Variant X attempts to provide some guidance to the application of the general formula of lack of conceivable basis, without providing examples for the various types of guaranty letters. While the basic situations described in Variant X probably embrace all particular situations arising under the various types of guaranty letters, it is submitted that Variant X would not provide sufficient guidance to ensure certainty and uniformity. For that reason, and based on the request of the Working Group to focus on a description of the improper demand and to take into account various types of instruments and their different purposes (A/CN.9/361, para. 91), the list of particular situations arising under different types of instruments is presented in Variant Y for consideration by the Working Group.

3. The words between square brackets are designed to emphasize the non-exhaustive character of the situations listed thereafter. It is submitted that, despite their illustrative character, the listed situations of clear impropriety are not only useful in cases where such situations occur but may also prove useful in setting guide-posts for other, comparable cases.

4. The proviso is designed to address situations where the terms of the guaranty letter indicate a restriction or an expansion of the risk usually covered by the particular type of guaranty letter.

5. If Variant Y were to be adopted, consideration might be given to giving a name to that type of guaranty letter (e.g., "financial guaranty letter") and to providing definitions of that and other types referred to in Variant Y, as already done in article 6 (d) for "counter-guaranty letter" and for all types of stand-by letters of credit in the United States proposal, article 6(2).

6. The wording between square brackets, while not absolutely necessary, might serve as a useful reminder that the obligations of the beneficiary in its capacity as issuer of a separate guaranty letter may be governed by a law other than the Convention.

Article 20. Set-off

Variant A — Unless otherwise agreed by the parties and subject to the provisions of the law of insolvency, the issuer may discharge its payment obligation under the guaranty letter by availing itself of a right of set-off with a claim against the person demanding payment [1], excepting any claim assigned to the issuer by the principal.

Variant B — Unless otherwise stipulated in the guaranty letter, the issuer may not discharge its payment obligation by means of a set-off with any claim assigned to it by the principal.

Remarks

1. The wording "by availing itself of a right of set-off" has been chosen, instead of the previous wording "by means of a set-off", in view of the understanding of the Working Group that the general law of set-off might impose further restrictions (A/CN.9/361, paras. 97-98). Taking this understanding one step further, Variant B merely presents the restriction and prohibits for claims assigned by the principal the exercise of any right of set-off available under the general law of set-off.

CHAPTER V. PROVISIONAL COURT MEASURES [1]

Article 21. Preliminary injunction [against issuer or beneficiary] [2]

(1) Where [,on an application by the principal,] it is manifestly and clearly shown [by documentary and other readily presentable means of evidence] that a demand made [or expected to be made] [3] by the beneficiary is improper according to article 19, [the] [a competent] [4] court may issue a preliminary order:

a) enjoining the issuer from meeting the demand [or from debiting the account of the principal], or

b) enjoining the beneficiary from accepting payment or ordering the beneficiary to withdraw the demand [or, if such a demand is expected to be made, not to make the demand],

provided that the refusal to issue such an order would cause the principal [serious harm] [irreparable loss].

[(2) Before deciding whether or not to issue a preliminary order, the court may provide the respondent with an opportunity to be heard.]

[(3) The court may make the effect of an order referred to in paragraph (1) of this article subject to the furnishing by the principal of such security as the court deems appropriate.]

(4) Variant A Paragraph (1) of this article does not preclude a court from issuing a preliminary order based on a ground other than improper demand if its procedural law so permits [; however, it may not issue a preliminary order based on non-conformity of documents with the terms and conditions of the guaranty letter] [5].

Variant B The provisions of paragraph (1) [and paragraphs (2) and (3)] of this article apply equally to an application by the principal for a preliminary order based on the ground of invalidity [, non-existence, ineffectiveness or unenforceability] of the guaranty letter.

Variant C The court may not issue a preliminary order [of the kind referred to in paragraph (1) of this article] [6] based on any ground other than improper demand.

[(5) The court may not order an attachment or seizure of assets of the beneficiary or of the issuer based on improper demand unless, in addition to the requirements of its procedural law, the conditions referred to in paragraph (1) of this article are met.] [7].

Remarks

1. This chapter might later be combined with chapter VI, depending on the final content and length of the provisions covered therein. Both chapters as well as chapter VII are addressed, as noted in a previous working paper (A/CN.9/WG.II/WP.73/Add.1, remark 1 to article 26), to the courts of the States where those chapters would be in force. If, following what is currently a working assumption, the final text were to be in the form of a Convention, questions relating to the territorial scope of application would need to be considered. For example, if the connecting factor suggested in article 1 were to be adopted, its effect on the applicability of chapters V to VII needs to be discussed. The Working Group may also wish to consider, probably at a later stage, whether the concerns expressed in respect of chapters V to VII might be met by making the provisions of those chapters subject to other treaties, or by including a reservation allowing Contracting States not to apply those provisions.

2. As agreed at the seventeenth session (A/CN.9/361, para. 116), an attempt has been made to merge the provisions of articles 21 and 22 and to reduce the procedural details regulated in paragraphs (2) to (4) of those articles.

3. As was stated at the seventeenth session (A/CN.9/361, para. 106), the need for allowing anticipatory injunctive relief would be greater if the Working Group were to decide against the notice requirement currently envisaged under article 15.

4. The reference to the competent court would not be needed if the provisions of article 21 were later to be combined with the provisions on court jurisdiction for provisional measures (article 25 (2)).

5. The wording between square brackets has been included in response to a concern expressed at the seventeenth session (A/CN.9/361, para. 109) that it would be especially disruptive if an injunction were allowed on the ground of non-conformity of documents. Although the concern was expressed in support of the view reflected now in Variant C, it might be appropriately addressed also in Variant A.

6. The wording between square brackets attempts to limit the prohibition embodied in Variant C to applications based on objections to the payment demanded by the beneficiary.

7. New paragraph (5) is based on a proposal to expand article 21 to deal also with other provisional measures such as prejudgment seizure or attachment of assets. While leaving the requirements and procedures of such measures to the general procedural law, the provision attempts to add the conditions for preliminary injunctions set forth in paragraph (1) as minimum conditions for such other measures, as an underpinning of the practical effect of the provisions on preliminary injunctions.

(Article 22 has been incorporated into article 21)

(Article 23 has been deleted)

CHAPTER VI. JURISDICTION [1]

Article 24. Choice of court or of arbitration

(1) The parties may, in the guaranty letter or by a separate agreement in a form referred to in paragraph (1) of article 7, designate a court or the courts of a specified State to settle disputes that have arisen or may arise in relation to the guaranty letter, or stipulate that any such dispute shall be settled by arbitration.

(2) The provisions of the preceding paragraph do not affect the jurisdiction of the courts [of Contracting States] [2] for provisional or protective measures.

Remarks

1. As regards the scope of application of this chapter and other questions relating to the entire chapter, see remark 1 to article 21.

2. The wording between square brackets is intended to solicit consideration of whether the rule of paragraph (2), according to which a choice-of-forum clause or an arbitration agreement does not affect any existing court competence for provisional or protective measures, should be limited to the courts of Contracting States or whether the rule, which does not itself confer jurisdiction on any court, should be as universal in scope as is paragraph (1).

Article 25. Determination of court jurisdiction

(1) Unless otherwise provided in accordance with paragraph (1) of article 24 [or if a designated court of another State declines to exercise jurisdiction] [1], the courts of the [Contracting] State where the guaranty letter was issued [may exercise] [have] jurisdiction over disputes between the issuer and the beneficiary relating to the guaranty letter.

(2) The courts of the [Contracting] State where the guaranty letter was issued may also entertain an application by the principal [in accordance with the provisions of article 21] for a preliminary order against the issuer

Variant A — or against the beneficiary. [2]

Variant B — , and the courts of a [Contracting] State in which the beneficiary has a place of business may entertain an application by the principal for a preliminary order against the beneficiary. [3]

Remarks

1. It is submitted that the wording between square brackets has not been rendered obsolete by the decision of the Working Group to delete paragraph (2) of article 24 which attempted to confer exclusive jurisdiction on the court chosen by the parties; even in the case of a non-exclusive jurisdiction clause the designated court might decline to exercise jurisdiction. In view of that decision, however, no provisions have been added for consideration by the Working Group on such issues as lis pendens, res iudicata or stay of proceedings.

2. Consideration might be given to limiting the jurisdictional rule presented in Variant A by adding such requirements as probable enforceability in the beneficiary's country or non-availability of preliminary orders in that country.

3. Consideration might be given to expanding the scope of paragraph (2) by including preliminary orders sought by the issuer against the beneficiary. It is submitted that such preliminary orders, like those sought by the beneficiary against the issuer, would otherwise be covered by paragraph (1), although that interpretation might not be immediately clear, especially in view of the distinction drawn in article 24 between applications for provisional measures and other court actions. If Variant A were to be adopted, such an expansion would clarify that interpretation by specifying for preliminary orders against the beneficiary the same rule as paragraph (1), and the same clarification should be made for preliminary orders sought by the beneficiary against the issuer. However, if Variant B were to be adopted, an expansion of paragraph (2) to include preliminary orders against the beneficiary would lead to a different result from that obtaining under paragraph (1).

CHAPTER VII. CONFLICT OF LAWS [1]

Article 26. Choice of applicable law

The rights, obligations and defences relating to [a] [an international] [2] guaranty letter are governed by the law designated by the parties. Such designation shall be by an express clause in the guaranty letter or in a separate agreement, or be demonstrated by the terms and conditions of the guaranty letter.

Remarks

1. As to the scope of application of chapter VII and other general questions relating to articles 21 to 27, see remark 1 to article 21. As regards the scope of application of chapter VII, there appears to be no theoretical reason not to limit the application of the conflict-of-laws rules to the field of application suggested in article 1. However, such limitation appears to be undesirable in practical terms. It is therefore suggested that the conflict-of-laws rules should be applied in a Contracting State irrespective of whether the guaranty letter was issued in any of the Contracting States.

2. The reference to the international character of the guaranty letter has been added to solicit consideration of whether such express limitation would be appropriate. One the one hand, one might object to that reference as being redundant since a conflict-of-laws context necessarily includes international elements. On the other hand, one might favour the reference on the ground that it might be surprising to find conflict-of-laws rules not expressly limited to international instruments in a draft Convention on international guaranty letters, assuming that that limitation will be retained in the final text. Moreover, some States might be unwilling to accept a provision that may be interpreted as allowing two parties of that State to choose the law of another State.

Article 27. Determination of applicable law [1]

Failing a choice of law in accordance with article 26, the rights, obligations and defences relating to a guaranty letter are governed by the law of the State where [the guaranty letter was issued] [the issuer has its place of business or, if the issuer has more than one place of business, where the issuer has that place of business at which the guaranty letter was issued] [2].

Remarks

1. In view of the brevity of the provisions of articles 26 and 27, consideration might be given to combining those provisions into a single article.

2. If the latter, more elaborate wording between square brackets were to be preferred by the Working Group, it should also be included in other articles containing that connecting factor (i.e., articles 1 and 25).